No. 56

In the Supreme Court of the United States

October Term, 1948

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RICHARD P. LAWSON, As Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,

Petitioner,

vs.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A Corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Brief for the Respondents.

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BRIEF FOR THE RESPONDENTS.

The respondents, Suwannee Fruit & Steamship Company, and Fidelity & Casualty Company of New York, will be referred to as the Employer and the Carrier, respectively, and the Petitioner will be referred to as the Commissioner.

STATEMENT OF THE CASE

It is not thought the Commissioner's brief (page 2) adequately presents the question to be decided. It may best be stated in the language of the District Court (R. 10):

> "The sole and narrow question here is whether the present employer, Suwannee, is liable for TOTAL permanent disability, or whether said employer is liable only for the maximum compensation for PARTIAL permanent disability, the remainder to be paid out of the special fund created by sec. 44 of the Act, 33 U. S. C. A. 944."

The question was stated substantially the same way in the opinion of the Fifth Circuit Court of Appeals (R. 21):

> "The sole question with which we are concerned is whether the employer, Suwannee Fruit and Steamship Company, is liable for compensation to its employee, Davis, for permanent total disability, under provisions of the Longshoremen's and Harbor Workers' Compensation Act, * * * or whether it is liable only for permanent partial disability, with the remainder of the allowed compensation to be paid out of the special fund created by Section 44 of the Act, 33 U. S. C. A. 944."

We propose to argue the question as submitted and in doing so, to answer the contentions made in the Commissioner's brief.

SUMMARY OF ARGUMENT

The whole case turns on the interpretation of Section 8 (f) (1) of the Longshoremen's and Harbor Worker's Compensation Act. Our argument may be summarized:

(a) The wording of the section is clear and unambiguous; it needs no construction, or interpretation. When the section is read, giving the words their ordinary meaning, it can have but one interpretation—(the meaning given it by the District Court and the Circuit Court of Appeals)—which is in accord with the intent of Congress and the purposes of the Act to provide benefits only for injury in employment.

(b) The New York decisions relied upon by the Commissioner are not decisive because of the differences in the language of the statutes involved; but even the New York

cases sustained the interpretation given by the Fifth Circuit Court of Appeals.

(c) The speculative predictions of the effect on the Special Fund and the inadequacy of the Fund are matters that should be directed to the attention of Congress rather than to this Court.

ARGUMENT

It has never been disputed by anyone that the employee has become totally and permanently disabled industrially, nor that he should be paid compensation benefits for total and permanent disability. The case presents an issue as to the source from which these payments should come. Should they be paid by the employer or should they be paid from the Special Fund created by Congress after the employer has paid, as it has, for the permanent partial disability resulting from the injury arising out of and in the course of the employment, in which the employee was engaged with the respondent? Respondent's position is these payments should be made from the Special Fund. This position has been taken by reason of the plain language of the section involved. It (33 U.S.C.A. 908 (f) (1) provides:

> "Injury increasing disability: (1) If an employee receives an injury which of itself would only cause partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in Section 944 of this chapter."

This language, as everyone concedes, read in its ordinary sense, leaves nothing for construction. An intent on the part of Congress, to relieve employers from compensation liability payable for a disability which did not arise from an injury by accident in their employment, is clearly expressed. Reasons for this Congressional intent are found in a report of Congressional hearings. We quote from a report of a hearing at which the quoted section was considered:

> "The second injury proposition is as much to the advantage of the employer and his interest as it is for the benefit of the employee. It protects that employer who has hired, say a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing (i.e. the exception clause) would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also * * *." Book I, House Committee Hearings, before Committee on Immigration, Naturalization and Insular Affairs, Interstate and Foreign Commerce, Irrigation and Reclamation, Judiciary, 1926, Vol. 438.

The Congressional Committee dealt with the identical situation involved in this case; and the language used in the section was deemed adequate to carry out the purpose of this discussion. The argument before the committee as quoted, persuasively sustained the interpretation the Court of Appeals places upon the quoted section.

No difficulty is encountered in determining the meaning of the section until an attempt is made to incorporate into it a certain definition of "injury" found in the Act. The Commissioner asserts this must be done. In this assertion he overlooks the basic purpose of the Act as well as the reason for incorporating any definitions into the Act. It cannot be gainsaid, the purpose of Congress, as expressed in the Act, was

to provide compensation for injury which arose out of employment. It was not interested in enacting a law providing generally for health and accident insurance to employees. With this purpose in mind, Congress realized the need of giving the Commissioners, who would administer the Act, a definition indicating the scope within which they should operate and the purpose to be accomplished by the Act. So we have a definition of "injury", for otherwise the Commissioners would be uninformed as to the nature of injuries for which compensation should be awarded. This definition limits the application of the act to injury "arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, * * *." 33 U.S.C.A. 902 (2). No clearer language could be chosen to express an intent to compensate only for injury arising out of employment; no words used, can be interpreted to indicate an intent to compensate for injury which did not arise out of employment.

The Commissioner's theory, therefore, is directly in the teeth of the intent of Congress. He argues the employer should pay compensation benefits for injury which did not arise out of the employment. To state his position, it seems to us, is to state its fallaciousness. To put it differently, in applying the definition of injury, the Commissioner ignores the positive mandate of Congress that only an injury in employment is compensable. In advocating this definition of injury must be applied to the exception clause, found in 8 (f) (1), he advocates payment of compensation for an injury *not* arising in employment. An interpretation should be given the statute which is in accordance with the purpose for which it was enacted. *Helvering* v. *Hammill*, 411 U. S. 504, 84 L.Ed. 303, 131 A.L.R. 1481; *Addison* v. *Holly Hill Fruit Products Co.*, 323 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007. The intent of Congress controls. *U. S.* v. *Ryan*, 284 U.S. 167, 76 L.Ed. 224.

The Commissioner asserts not only the definition of "injury" but also the definition of "disability" must be included. The definition of "disability" leads to no inconsistency with the purpose of the statute or the language of the quoted section. It is only when it is sought to incorporate the definition of "injury" into the definition of "disability" that the purpose of the Act cannot be reconciled with the resulting meaning given the section. It is argued, however, that if a part of the definition of "injury" is omitted, no incongruity results; but to ignore part of the definition is no different from ignoring all of it.

Reliance is placed by the Commissioner upon *National Homeopathic Hospital Association* vs. *Britton* (U.S.C.A. D.C.) 142 F. (2d) 561, where a divided court held the definitions should be so used. Chief Justice Groner dissented. His argument, as set forth in his dissenting opinion (564 to 567) convinced the District Court and the Fifth Circuit Court of Appeals, this dissenting opinion being followed by these courts rather than the opinion by the majority. In all three opinions it was determined, after a careful analysis of the statute, and the Congressional purpose, that the words "disability" and "injury" as used in the quoted section should be given an ordinary meaning. This is the only section in which any incongruity arises from the use of these definitions. It seems, therefore, Congress, in using the expression "previous disability" had no intention of applying a definition for one word of this expression, when such application of a definition not only produces an incongruity, but also thwarts the Congressional intent and purpose: compensation benefits only for injury arising out of industry.

Applying the definitions as suggested by the Commissioner, brings on other difficulties. As emphasized by Judge Groner in his opinion, the Act relates only to maritime workers. Is it to be assumed that the exception clause applies only to persons injured in a maritime employment; or does it apply to injuries in industry where no compensation act existed; or

does it apply to industrial injuries which are not compensable? No answer can be given to these questions from reading the Act; but, answering them is obviated, by giving to the word "disability" its plain, ordinary meaning. The purpose of the exception clause as shown by its legislative history before the committee contemplated no such hair-splitting between industrial accident, compensable accident, maritime accident or disease and accident. Simple words provide that disability *not* caused by the employment should not be the basis for total disability compensation benefits when coupled with an injury which *did* arise in the employment.

It is argued that the rule announced in the Britton case has received support in other decisions. We do not find this support in the cases cited. In *Temperance River Co.* v. *Legarde*, 65 F.Supp. 161, the District Judge thought the Britton case binding because this Court had refused to grant certiorari. The case of *Liberty Stevedoring Co.* v. *Cardillo*, 18 F. Supp. 729, dealt with an injury to a deformed member of an employee, the opinion stating that Section 8(f) had no application. No interpretation of this section was attempted. *Grays Harbor Stevedoring Co.* v. *Marshall*, 36 F. Supp. 814, deals with the aggravation of a preexisting disease, arthritis. In *Wood Preserving Corporation* v. *McManigal*, 39 F. Supp. 177, it is said "* * * accordingly, the case is not governed by Section 8(f) of the Act * * * ."

While the word "injury" is defined in Section 902(2) of the Act, we emphasize a distinctive wording when Congress dealt with the disability compensable under the Act. In defining injury, the Act reads:

> "When used in this chapter — * * * * (2) the term 'injury' means accidental injury or death arising out of or in the course of the employment * * * ."

"Term" is defined by Webster as a "word or expression having a precisely limited meaning or peculiar to a science, art, or the

like; * * * ." Here then, we may say when Congress defined the *term* it gave that term a technical, or peculiar, or limited meaning. It could have omitted the word "term" entirely. As it did not do so, it seems clear that this definition is of a word rather than of a condition expressed by the word. When "disability" was dealt with, we find Congress using this language:

> "When used in this chapter . . . : (10). 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Why did not Congress again define a term? Is it not a logical inference from this change of language that the term "injury" was to be defined, but that the word or term "disability" was not to be defined, the definition relating to the condition represented by the word. This permits the use of the word with its ordinary meaning unless it is used with reference to the disability which is compensable under the Act. So, when the word disability is used in 8(f) (1) without any intent to refer to the kind of disability which is compensable under the Act, but with the intent of eliminating a condition which is not compensable, the ordinary meaning of the word is the only meaning that Congress intended it to have. It is for this reason no confusion results from the use of the word with its ordinary meaning and that confusion does result when it is attempted to abandon this clear meaning for a strained and twisted meaning based upon a supposed definition of a "term" which is not defined by the Act. If this is a technical construction of Section 902, where definitions are found, it is not more technical than is sought by the Commissioner in applying these same definitions to paragraph 8(f) (1). As the *term* "disability" is not defined we have no need to use the definition of the *condition* "disability" in determining the meaning of the section of the Act under consideration.

CASES OF AGGRAVATION OF A DISEASED CONDITION DIFFERENT FROM CASES OF SEPARATE INJURY: Clear thinking may be prevented by the citation of cases dealing with rules applic-

able where a compensable injury *aggravates* a pre-existing *diseased condition*. While the Act provides compensation must be paid for all the consequences of an injury in the employment, when the injury aggravates a pre-existing diseased condition, this does not mean that compensation will be paid for pre-existing disability which was not aggravated by an injury in the employment. The aggravation of an existing condition is only compensable if the aggravation is by reason of injury arising out of and in the course of employment. This is utterly different from a situation where two separate injuries, or an injury plus a condition, neither aggravating the other, produce a particular amount of disability. The cases distinguished between weakness or disease which does not become manifest until a subsequent accident and between a prior disability which resulted from a prior condition or injury. The injury of a man with a diseased arm or a diseased eye imposes liability for compensation benefits for all of the effects of that injury on the diseased member or organ, but when the diseased condition is not affected by the subsequent injury, the diseased condition is not taken into account in determining what compensation benefits are allowable or in determining the extent of disability compensable as arising out of the employment. Our case does not present the aggravation of a preexisting diseased condition. The pre-existing condition continues as it was—the sight in the right eye is no better or no worse as a result of the injury by accident which destroyed the sight in the left eye. The impairment in the right eye continues as it was before the injury to the left eye. Cases of aggravation are inapplicable, for no helpful analogy can be drawn between these different factual situations, to which different rules of law apply.

THE POLICY OF THE ACT: It is argued that the interpretation of Section 8(f) (1), as made by the Fifth Circuit Court of Appeals, is not in accord with the purpose of the Act. This we do not agree to. The purpose of this Act was to provide compensation for employees working on vessels on navigable waters who, although they might be classed as seamen, were

regarded as distinct from members of the crew of the vessel, being persons whose service was more that of laborers as distinguished from that of employees on vessels who aid in her navigation. *South Chicago Dock Company*, v. *Bassett*, 309 U.S. 251, 84 L.Ed. 732. It has never been suggested the purpose of the Act was to provide compensation benefits for this class of laborer simply because he had a physical handicap. The Act, like the State Compensation Acts, sought to impose upon industry responsibility for the injuries caused by employment. No other purpose can be read into any compensation act. To argue, as the Commissioner does, that industry should be burdened with the payment of compensation benefits for disability which did not arise out of accidental injury in the employment or which was not aggravated by injury in the employment, is to argue for an interpretation of compensation acts contrary to that given by every authority and every court. It is the Commissioner's theory which goes contrariwise to the recognized purpose of compensation legislation. His purpose is to burden industry with a responsibility beyond the purpose of the Act. It ignores the Congressional determination that some disabilities should not be compensable by industry, but should be compensable from a fund which Congress created for that purpose. To accept his argument, we must add a liability which was not intended. In doing so we deprive the handicapped workman of a free right of employment by employers willing to accept him "as is", but unwilling to make him whole again. Our interpretation of this section is in accord with the purpose of the Act while the contention of the Commissioner is completely out of harmony with it.

STATE DECISIONS: In his brief (page 21) a federal case and certain state court cases are cited with the statement that these decisions present factual situations virtually identical with that now being considered and that in them the employer was held liable for total and permanent disability compensation benefits. Evidently it is meant the *employer* and not a Special Fund was held responsible. The cases do not sustain

this statement, for no similar facts were involved. In *Killisnoo Packing Co.* vs. *Scott*, 14 F.(2d) 86, the court did not interpret Section 8(f) at all. It was not involved. It was decided the statute involved should be interpreted to allow total disability. That point is conceded here by everyone. The case of *Moore* v. *Western Coal Co.*, 124 Kan. 214, we understand, is no longer effective in Kansas. The other cases cited likewise turn on different points. State court cases are of little value. As is said by the annotator in 142 A.L.R. 822, the conflict in the state courts is due largely to the difference in the wording of the various compensation statutes. There is no uniform answer to the question whether an employee who has lost the sight of one of his eyes should be allowed compensation for total disability where he subsequently loses the sight of the other.

But if the field of State Court decisions is to be entered, we submit the following cases support the respondent's interpretation of Section 8(f) (1):

Lehman vs. *Shmahl*, 179 Minn. 388, 299 N. W. 553; *Kupiak* vs. *Briggs Mfg. Co.*, 286 Mich. 329, 282 N. W. 427; *Houg* vs. *Ford Motor Co.*, 288 Mich. 478, 285 N. W. 27; *Lente* vs. *Lucci*, (Pa.) 119 Atl. 132, 24 A.L.R. 1462; *Catlett* vs. *Chattanooga Handle Co.*, 165 Tenn. 343, 55 S. W. (2d) 257; and *Cain* vs. *Staley Mfg. Co.*, 97 Ind. App. 235, 186 N. W. 265.

THE EFFECT UPON THE SPECIAL FUND: It is asserted the burden of paying compensation for non-industrial previous disability should be placed upon the employer rather than upon the special fund as directed by Congress because this fund may not be sufficient to meet the demands created by the interpretation we have given Section 8(f) (1). The record contains no pleading and no evidence of any factual basis for this contention. We think it should be ignored. While the Commissioner's brief states the balance in the Special Fund and the amount paid in for a particular year, these figures furnish inadequate information for determining the effect of

either interpretation upon the Special Fund of Section 8(f)(1). The suggested danger of exhaustion seems a speculative prediction. The provisions creating the fund have been effective since the passage of the Act in 1927, with apparently no effort on the part of the Commissioner or anyone else to show to Congress the necessity for augmenting the Special Fund. It seems that twenty years is a fairly reasonable time within which to determine the adequacy of the provision made by Congress. If the fund is inadequate for any reason, Congress, upon a proper presentation of facts so indicating, would unquestionably make adequate amendment to the Act. It is not the province of the courts to amend the law. The function of judicial interpretation of a statute is to bring out and give effect to that which is already in it. *E. C. Schroeder Co.* v. *Clifton*, 154 F.(2d). 385, cert. den., 328 U.S. 858, 90 L.Ed. 1629, reh. den., 329 U.S. 821, 91 L.Ed. 699.

> "We agree that the Act is to be liberally construed, but neither the deputy commissioner nor the courts have the power to legislate; * * *." *Kobilkin* v. *Pillsburg*, 103 F. (2d) 667, aff. 309 U.S. 619, 84 L.Ed. 983, reh. den., 309 U.S. 695, 84 L.Ed. 1035.

NEW YORK CASES DO NOT SUSTAIN THE COMMISSIONER: The point is made by the Commissioner (brief page 18) that certain New York cases interpreting the New York Compensation Act sustain his contention. He quotes in a footnote Section 15 (7) of the New York law (brief page 18). We do not agree with his interpretation of these cases. We think we can show he fails to support his contention, by the cases cited, that previously disability must result from an industrial injury before the quoted section applies. In *Pyshnock* v. *Henry Forge & Tool, Inc.*, 247 App. Div. 842, 272 N. Y. 546, 4 N. E. (2d) 729, the only question involved was the sufficiency of the evidence to sustain a finding that complete loss of use was the natural result of the injury. While the eye had sustained a prior injury, it does not appear that it was an industrial injury for which compensation was or could have been paid. In

La Belle v. *Britton Store and Supply Co.*, 247 App. Div. 843, 286 N.Y.S. 347, it can not be determined that Section 15(7) is involved. In *Bervilacqua* v. *Clark*, 225 App. Div. 190, 250 N.Y. 589, 166 N. E. 335, in the opinion by the Circuit Court of Appeals nothing was said except "Order affirmed, with costs on the ground that the disability caused solely by the accident is due to the loss of a member." But in *Shurick* v. *Bayer Co.*, 256 App. Div. 651, 272 N.Y. 217, 5 N.E. (2d) 713, the court interpreted this New York statute without asserting that the prior disability must result from an industrial accident:

> "While it is not now necessary to decide that the disability referred to in the phrase 'suffering from a previous disability,' in the proviso (Subdivision 7), must be one of those mentioned in Subdivision 8, considerations of practical administration demand at least that it be, as to its existence and extent, substantially as certain and as capable of ascertainment as are those. Here, it is doubtful whether the claimant, when he received the later injury, can be said to have been suffering from a previous disability at all. Disability is a word of varied content, not defined in the Compensation Law except in Section 37, which is confined to occupational diseases. Nevertheless, an existing disability is generally reflected in wage-earning capacity. A weakness, whether pathological or traumatic in origin, which does not become manifest until an accident occurs, it not ordinarily thought of as a disability. But even if the condition of the claimant's arm at the time of the later injury be regarded as a disability the extent of its contribution to the later injury is too speculative for practical purposes."

But because of difference in language between the New York Statute and the Longshoremen's and Harbor Worker's Act, no rule by analogy can be applied. Chief Justice Groner well stated this:

> "I have carefully considered the Board's argument that the view expressed is not sustained by the New York compensation cases under the New York law, and several intermediate court decisions are cited to sustain this

assertion. But an examination of these cases discloses that none of them decides the precise point we have here. Besides, the language of the New York and the Federal Acts discloses marked differences." *National Homeopathic Hospital Association of D. C.* v. *Britton*, 147 F. (2d) 561, at 567.

Nothing in the history of the Longshoremen's and Harbor Workers' Act indicates any language of the New York Act or any decision by the New York courts was adopted when Congressional Committees discussed the effect of the Act. To the contrary, the report before the committee cited shows Congress sought to relieve employers from the very liability the Commissioner now seeks to impose upon them.

CONCLUSION

The purpose of the Act is to provide compensation benefits, to be paid by the employer, for injury arising out of employment. It was never intended to burden the employer with compensation benefits for disability which did not arise out of the employment or which was not aggravated by injury in the employment. This purpose is directly indicated by the limitation of liability for compensation benefits to accidental injury arising out of and in the course of the employment. If we lose sight of the words "arising out of and in the course of the employment," we lose sight of the purpose of the legislation. The Commissioner would eliminate these words completely. As stated by the District Judge (R. 12) to adopt the Commissioner's theory will produce, " * * * a result which this court believes is not only contrary to the Congressional intent, but is out of harmony with the remainder of the Act.

The interpretation contended for by the Commissioner contravenes the recognized rules for interpretation:

> "It is our function, however, to interpret and construe statutes, not make them, and not to extend them beyond what appears to be the legislative intent. We cannot obey the Shakespearean maxim and wrest the law

to our authority, even once. The Longshoremen's and Harbor Workers' Act is indeed a remedial statute, enacted to subserve an admirable purpose. It should perforce be construed liberally, even generously; but its provisions should not be so distorted by the courts as to make it a trap for employers." *Motor Boat Sales, Inc.*, v. *Parker*, 116 F. (2d) 789 (Certiorari granted and reversed on other grounds. 314 U.S. 244, 86 L.Ed. 184).

If the Special Fund ever proves to be inadequate, the remedy is with Congress, not here. Speculative prediction should not be the basis of interpretation which requires the payment of compensation benefits for a disability not arising out of the employment when Congress has clearly indicated it desired industry to pay only for benefits for disabilities arising out of the employment.

Respectfully submitted.

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